

SENATE BILL 213
By Person

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 14, Part 1, relative to telecommunications.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-14-149, is amended by deleting that section in its entirety and by substituting instead the following language:

Section 39-14-149.

(a) It is an offense for any person knowingly to:

(1) Possess, use, make, develop, assemble, sell, distribute, lease, license, transfer, import into this state or offer, promote or advertise any unlawful communication device:

(A) For the unauthorized acquisition or theft of any communication service or to receive, intercept, disrupt, transmit, re-transmit, decrypt, acquire or facilitate the receipt, interception, disruption, transmission, re-transmission, decryption or acquisition of any communication service without the express consent or express authorization of the communication service provider; or

(B) To conceal, or to assist another to conceal, from any communication service provider or from any lawful authority the existence or place of origin or destination of any communication.

(2) Modify, alter, program or reprogram a communication device designed or adapted, or which is used, for the purposes prohibited in subsections (a)(1)(A) and (B) above;

(3) Possess, use, manufacture, assemble, develop, distribute, import into this state, license, transfer, sell, lease or offer, promote or advertise for sale, use, lease or distribution any unlawful access device;

(4) Possess, use, distribute, sell, give, transfer or offer, promote or advertise for sale, use or distribution any:

(A) Plans or instructions for making or assembling any unlawful communication or access device under circumstances evincing an intent to use or employ the unlawful communication or access device, or to allow the same to be used or employed, for a purpose prohibited by this section, or knowing or having reason to believe that the same is intended to be so used, or that the plans or instructions are intended to be used for making or assembling the unlawful communication or access device for a purpose prohibited by this section; or

(B) Material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, development or assembly of an unlawful communication or access device for a purpose prohibited by this section;

(5) Publish plans or instructions for making, assembling or using any unlawful communication or access device with the intent of promoting the

making, assembling or using of an unlawful communication or access device for a purpose prohibited by this section;

(6) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have the telephone number, credit number, credit device or method of numbering or coding so used; or

(7) Knowingly assist others in committing any of the acts prohibited by this section.

(b) Any unlawful communication or access device, plans, instructions or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section. Upon the conviction of a person for a violation of this section, the court may order the sheriff of the county in which the person was convicted to destroy as contraband or to otherwise lawfully dispose of the unlawful communication or access device, plans, instructions or publications which have been seized by law enforcement officers or are in the defendant's possession or control at the time of conviction.

(c) As used in this section, unless the context otherwise requires:

(1) "Communication device" means any type of electronic mechanism, transmission lines or connections and appurtenances thereto, instrument, device, machine, equipment, technology or software that is capable of intercepting, transmitting, re-transmitting, acquiring, decrypting or receiving any communication service, including the receipt, acquisition, interception, transmission, re-transmission or decryption of any communication service

provided by or through any cable television, fiber optic, telephone, satellite, microwave, data transmission, radio, Internet-based or wireless distribution network, system or facility, and components thereof, including any computer circuit, splitters, connectors, switches, transmission hardware, security module, smart card, software, computer chip, electronic mechanism or any component, accessory or part of any communication device which is capable of facilitating the interception, transmission, re-transmission, decryption, acquisition or reception of any communication service;

(2) "Communication service" means any service lawfully provided for a charge or compensation to facilitate the lawful origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular or other wireless telephones, wire, wireless, radio, electromagnetic, photoelectronic or photo-optical systems, networks or facilities; and any service lawfully provided by any radio, telephone, photo-optical, electromagnetic, photoelectronic, fiber optic, cable television, satellite, microwave, data transmission, wireless or Internet-based distribution system, network or facility, including, but not limited to, any and all electronic, data, video, audio, Internet access, telephonic, microwave and radio communications, transmissions, signals and services, and any such communications, transmissions, signals and services lawfully provided directly or indirectly by or through any of the aforementioned systems, networks or facilities;

(3) "Communication service provider" means:

(A) Any person or entity providing a communication service, whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging or other wireless communications company or other

person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or communication service;

(B) Any person or entity owning or operating any fiber optic, photo-optical, electromagnetic, photoelectronic, cable television, satellite, Internet-based, telephone, wireless, microwave, data transmission or radio distribution system, network or facility; and

(C) Any person or entity providing any communication service directly or indirectly by or through any such distribution systems, networks or facilities.

(4) "Manufacture, develop or assemble an unlawful access device"

means to make, develop, produce or assemble an unlawful access device or to modify, alter, program or reprogram any instrument, device, machine, equipment, technology or software so that it is capable of defeating or circumventing any technology, device or software used by the provider, owner or licensee of a communication service, or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video services, programs or transmissions from unauthorized receipt, interception, acquisition, access, decryption, disclosure, communication, transmission or re-transmission, or to knowingly assist others in those activities.

(5) "Manufacture, develop or assemble an unlawful communication

device" means to make, produce or assemble an unlawful communication device or to modify, alter, program or reprogram a communication device to be capable of acquiring, intercepting, disrupting, receiving, transmitting, re-transmitting, decrypting or facilitating the acquisition, interception, disruption, receipt, transmission, re-transmission or decryption of a communication service without

the express consent or express authorization of the communication service provider, or to knowingly assist others in those activities;

(6) "Publish" means the communication or dissemination of information to any one (1) or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including, without limitation, a letter or memorandum, circular or handbill, newspaper or magazine article, or book or electronically, including, without limitation, by computer, electronic mail or paging device;

(7) "Unlawful access device" means any type of instrument, device, machine, equipment, technology or software which is primarily designed, developed, assembled, manufactured, sold, distributed, possessed, used or offered, promoted or advertised, for the purpose of defeating or circumventing any technology, device or software, or any component or part thereof, used by the provider, owner or licensee of any communication service or of any data, audio or video programs or transmissions, to protect any such communication, data, audio or video services, programs or transmissions from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission or re-transmission.

(8) "Unlawful communication device" means any communication device that is capable, or has been altered, modified, programmed or reprogrammed alone or in conjunction with another device or other equipment so as to be capable of acquiring or facilitating the acquisition of any electronic serial number, mobile identification number, personal identification number or any communication service without the consent of the communication service provider. "Unlawful communication device" also means:

(A) Any scanners capable of intercepting electronic serial numbers, pin codes, mobile identification numbers, scanning receivers of a wireless communication service, any phones altered to obtain service without the express consent or express authorization of the communication service provider, tumbler phones, counterfeit or clone phones, tumbler microchips, counterfeit or clone microchips and other instruments capable of disguising the identity or location of any communication devices, or of gaining unauthorized access to a communications system operated by a communication service provider; and

(B) Any communication device which is capable of, or has been altered, designed, modified, programmed or reprogrammed, alone or in conjunction with another communication device or devices, so as to be capable of, or facilitating the disruption, acquisition, interception, receipt, transmission, re-transmission or decryption of a communication service without the express consent or express authorization of the communication service provider, including, but not limited to, any device, technology, product, service, equipment, computer software or component or part thereof, primarily distributed, sold, designed, assembled, developed, manufactured, modified, programmed, reprogrammed or used for the purpose of providing the unauthorized receipt of, interception of, transmission or re-transmission of, disruption of, decryption of, access to or acquisition of any communication service provided by any communication service provider.

(d) This section shall not apply to any communication device used, owned or operated by a law enforcement agency or by a communication service provider lawfully acting in that capacity.

(e)

(1) A violation of this section may also be punished as a theft of service as provided in § 39-14-104 and as a theft of cable television service as provided in § 7-59-109.

(2) A violation of this section involving five (5) or more unlawful communication or access devices is a Class D felony.

(3) A willful violation of this section involving less than five (5) unlawful communication or access devices is a Class E felony.

(4) Any other violation of this section is a Class B misdemeanor.

(5) For purposes of all criminal penalties established for violations of this section, the prohibited activity established herein as it applies to each unlawful communication or access device shall be deemed a separate offense. Each day a person is in violation of this section also constitutes a separate offense.

(6) For purposes of imposing fines upon conviction of a defendant for a violation of this section, all fines shall be imposed as authorized by law for each unlawful communication or access device involved in the violation and for each day a defendant is in violation of this section.

(7) The court shall in addition to any other sentence authorized by law, order a person convicted of violating this section to make restitution for the offense.

(8) An offense under this section may be deemed to have been committed at either the place where the defendant manufactures, develops or assembles an unlawful communication or access device or assists others in

doing so, or the places where the unlawful communication or access device is sold or delivered to a purchaser or recipient. It shall be no defense to a violation of this section that some of the acts constituting the violation occurred outside of the state of Tennessee.

(f) In any criminal prosecution or civil action under this section, any of the following shall create an inference that the defendant intended to violate this section:

(1) The presence of an unauthorized connection of any kind between the defendant's property and any network, system or facility owned or operated by a communication service provider; or

(2) The presence on the defendant's property, or in the defendant's possession or control, of any communication device which is connected in such a manner as would permit the unauthorized receipt, interception, acquisition, decryption, transmission or re-transmission of a communication service; or

(3) The defendant's possession of five (5) or more unlawful communication or access devices for any purpose prohibited by this section.

Where a communication service provider notifies the defendant in writing of the circumstances described in subparagraphs (a) or (b) above and the same circumstances are found to exist within a reasonable time thereafter, an inference shall be created that the defendant acted willfully in violation of this section.

(g) Civil actions.

(1) Any person aggrieved by a violation of this section may bring a civil action in any court of competent jurisdiction. "Any person aggrieved" shall include any communication service provider.

(2) The court may:

(A) award declaratory relief and other equitable remedies, including preliminary and final injunctions to prevent or restrain violations

of this section, without requiring proof that the plaintiff has suffered, or is threatened with actual damages, irreparable harm or lacks an adequate remedy at law;

(B) at any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any unlawful communication or access device that is in the custody or control of the violator and that the court has reasonable cause to believe was involved in the alleged violation of this section;

(C) award damages as described in subsection (4) below; and

(D) as part of a final judgment or decree finding a violation of this section, order the remedial modification or destruction of any unlawful communication or access device, or any other devices or equipment involved in the violation, that is in the custody or control of the violator, or has been impounded under subparagraph (ii) above.

(3) The court shall award reasonable attorney's fees and costs, including, but not limited to, costs for investigation, testing and expert witness fees, to an aggrieved party who prevails.

(4) Damages awarded by a court under this section shall be computed as either of the following:

(A) Upon election of such damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by such party as a result of violations of this section and all profits of the violator that are attributable to all violations of this section and are not taken into account in computing the actual damages. Actual damages include the retail value of all communication services to which the violator had unauthorized access as a result of the violation,

and the retail value of any communication services illegally available to those persons to whom the violator directly or indirectly provided or distributed any unlawful communication or access devices. In proving actual damages, the complaining party shall be required to prove only that the violator manufactured, distributed or sold any unlawful communication or access devices, but shall not be required to prove that those devices were actually used in violation of this section. In determining the violator's profits, the complaining party shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(ii) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages and the violator's profits, an award of statutory damages of between one thousand five hundred dollars (\$1,500) to ten thousand dollars (\$10,000) for each unlawful communication or access device involved in the action and for each day the defendant was in violation of this section, with the amount of statutory damages to be determined by the court, as the court considers just.

(5) In any case where the court finds that any violation of this section was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages awarded under subparagraphs (4)(i) or (ii) above, by an amount of not more than fifty thousand dollars (\$50,000) for each unlawful communication or access device involved in the action and for each day the defendant was in violation of this section.

SECTION 2. This act shall take effect July 1, 2003, the public welfare requiring it.